

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7507

Petition of Telephone Operating Company of)
Vermont LLC, d/b/a FairPoint Communications,)
for Waiver of Retail Service Quality)
Compensation Points)

Order entered: 8/6/2009

ORDER RE: WAIVER REQUEST

I. INTRODUCTION

On March 31, 2009, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint" or the "Company"), filed its annual retail service quality report. In its filing, FairPoint petitioned the Public Service Board ("Board") for a waiver, pursuant to Paragraph C(5) of the 2005–2010 Amended Retail Service Quality Plan ("RSQP"), of the imposition of 25 service quality points resulting from the December 2008 ice storm that affected southern Vermont. The Department of Public Service ("Department") opposes FairPoint's waiver petition.

In this Order, the Board grants, in part, FairPoint's waiver request. The ice storm was a significant event outside of FairPoint's control that affected a large number of telephone and electric customers in southern Vermont. We conclude that FairPoint has shown that it constituted exceptional circumstances and thus a waiver is appropriate. Nonetheless, we do not accept FairPoint's methodology for recalculating the service quality penalty points under the RSQP. Instead of using the first week of December as a proxy for the entire month, as FairPoint proposes, we direct FairPoint to use the average of the preceding eleven months as the December performance figure.

II. BACKGROUND

The Board adopted the RSQP in 2005 as part of the renewal of the alternative regulation plan for Verizon New England Inc., d/b/a Verizon Vermont ("Verizon").¹ The RSQP measures FairPoint's retail service quality performance each calendar-year in 18 areas and imposes service quality compensation points for each Baseline Standard that is exceeded. Any compensation points that FairPoint accrues are, in turn, converted into an aggregate dollar amount FairPoint must return to customers in the form of a bill credit.

The RSQP also allows FairPoint to request the Board to waive service quality compensation points based upon "exceptional circumstances." In any filing, FairPoint bears the burden of demonstrating that the waiver is appropriate and that its "level of preparedness and response was reasonable in light of the cause of the failure."²

III. POSITIONS OF THE PARTIES

In its annual filing for calendar year 2008, FairPoint calculates a total of 78 compensation points associated with three performance measures — Percent Troubles Not Cleared in 24 Hours-Residence, Percent Troubles Not Cleared in 24 Hours-Business, and Percent of Calls Not Answered Within 20 Seconds-Residence. FairPoint seeks a waiver of the imposition of 25 of these compensation points that it states are associated with an ice storm and other storms that occurred during December 11–21, 2008. If the waiver were granted, the payments under the RSQP would be based upon 53 compensation points. Essentially, FairPoint asks that we exclude this period from the RSQP calculation and instead use the performance from the first eight days of the month of December as the performance indicator for the entire month.

FairPoint asserts that the ice storm caused significant damage throughout southern Vermont, which led to \$1 million in damage-restoration costs. The damage associated with the ice storm produced widespread loss of commercial power and telephone service. The loss of power also had a broader affect on FairPoint offices in Brattleboro, Wilmington, Jacksonville,

1. In 2008, FairPoint acquired Verizon's local exchange assets in Vermont; as a condition of the Board's approval of the acquisition, we required FairPoint to assume Verizon's responsibilities under the alternative regulation plan, including the RSQP.

2. RSQP, Section C.5.

Wardsboro, Readsboro, and West Dover as well as 50 remote terminals, requiring generator backup power for the latter. Statewide, FairPoint contends that 12 central offices required generator backup power and 120 utility poles, miles of cable and wire and over 900 customer service lines required replacement.

FairPoint asserts that it made extraordinary efforts to correct the problems caused by the storm so that it was able to clear 46% of its troubles within 48 hours and 70% within four days. The Company also installed portable generators to help address the outage problems, but due to limited access, 10 affected remote terminals were not accessible and thus lost power after backup batteries were exhausted. For the three measures mentioned above, the ice storm and FairPoint's difficulty in responding to it led to worse measured annual performance under these standards. FairPoint would almost certainly have exceeded all three of these standards even without the ice storm, but the storm impacts resulted in much worse performance under the two repair standards. FairPoint also claims that, because its performance in these three areas had improved in the four months leading up to the ice storm, its performance in the early part of December reflects a valid measure.

The Department commented on FairPoint's waiver request on April 20, 2009. The Department does not contest the fact that the storm had an effect upon FairPoint's service. However, the Department asks that the Board deny FairPoint's request due to FairPoint's lack of preparedness for such a power outage. The Department highlights the fact that FairPoint had foreseen the need to purchase additional generators for outages such as occurred in December 2008. FairPoint's predecessor, Verizon, had committed to a plan to purchase 30 additional generators (in the context of Docket 6957), but the purchase had been delayed to the spring of 2009. The Department also cites Verizon's previous statements that it had sufficient resources to minimize service disruptions. Further, the Department contends that FairPoint did not invoke the mutual-aid arrangements that it had entered into in response to a condition of FairPoint's acquisition of Verizon, nor did it call upon assistance from FairPoint employees in areas that were not affected by the storm. Finally, the Department states that FairPoint's performance in January 2009 was not appreciably different from the average performance from 2008 (and for two of the three measures, were worse), so it discounts FairPoint's assertion that the Company's

performance had improved. For these reasons, the Department attributes the 25 penalty points to actions that were within or should have been within FairPoint's control.

FairPoint replied to the Department's comments on May 5, 2009. FairPoint argues that the January 2009 results are not indicative of its performance since the Company was still affected by the ice storm at that time. FairPoint also contends that the number of employees and other workers was not a factor in its failure to meet the RSQP standards in December; according to FairPoint, it had sufficient staff, but was unable to make use of the employees due to blockage of roads and the need to wait for electrical work to be done first. FairPoint also objects to the Department's assertion that it had insufficient generators to address the outage problems. FairPoint states that the storm, not generator availability, prevented deployment at other sites.

IV. DISCUSSION

There is no question that the ice storm and other storms that affected southern Vermont beginning on December 11, 2008, were an exceptional event that led to widespread outages throughout that region. The damage caused by the storms, including downed trees and power lines, made repair more difficult by limiting access to certain customers and facilities. FairPoint's performance data under the RSQP for both the residential and business repair standards show the effect of the storm, producing results for December that significantly exceed the average for the other eleven months of the year. For example, FairPoint was only able to clear 47.7 percent of residential troubles within 24 hours in December (even including relatively good performance from December 1–8), compared to 59 percent for the other eleven months. Repair of business lines showed a similar trend.

Although the Department and FairPoint agree that the storm itself was exceptional, they differ on two issues: (1) whether FairPoint's level of preparedness was adequate; and (2) how should we appropriately calculate the RSQP measures for December 2008 in light of the events. We address each of these issues.

1. FairPoint's Level of Preparedness

The Department's assertion that FairPoint's level of preparedness was inadequate focuses on the allocation of personnel resources (both FairPoint's and those technicians upon which it may call from other utilities) and backup facilities, namely generators. In terms of personnel resources, the Department contends that FairPoint did not avail itself of mutual-aid arrangements that it had entered into with other utilities. The Department suggests that FairPoint did not divert resources from other, unaffected areas to assist in the recovery.

We find neither of these assertions persuasive. FairPoint has stated that its inability to restore service more quickly was not a function of personnel. Instead, FairPoint asserts that it was the inability to access the customer locations and remote terminals that created the problem. Allocation of additional personnel, either its own, or another utility's, would not have solved the difficulties of getting access to these locations or dealing with downed electric lines.

The availability of backup generators, however, raises a different set of concerns. As the Department notes, FairPoint has previously identified the need for more backup generators. As part of the network reliability investments to which FairPoint committed in Docket 6957, the Company planned to purchase additional generators to address the possibility of events such as the ice storm that would lead to lack of power at central offices and remote terminals. This investment had not yet occurred at the time of the ice storm. More recently, in February of this year, FairPoint stated in a Performance Enhancement Plan ("PEP") filing that it planned to purchase an additional 47 generators. These statements implicitly recognize that additional backup generators were needed to assure network reliability.

At the same time, it is not clear that additional generators would have had much of an effect. FairPoint asserts that the outage magnitude was due to the restricted access to roads, downed power lines and damaged trees. FairPoint's initial filing also states that it was able to install portable generators at the 40 remote terminals that were immediately accessible, but that the remaining 10 terminals were not accessible. The Department has not refuted this assertion. Thus, we find no basis to conclude that it was a shortage of generators, as the Department

suggests, rather than FairPoint's access to those generators, that led to FairPoint's inability to respond to customer troubles.³

2. Measurement for December 2008

In lieu of using performance data for the month of December, which includes the ice-storm-affected period of December 11–31, FairPoint proposes to use only the first eight days of the month. As noted above, FairPoint contends that its performance throughout the month would have been consistent with this period, but for the ice storm. The Department disagrees with this assertion, pointing to the January results.

We agree with FairPoint that it is difficult to draw any conclusions from the January 2009 performance as to what the Company's performance would have been in December 2008 had the ice storm not occurred. Some aspects of the ice storm were still affecting FairPoint's service and thereby the RSQP measures at issue here. However, we are also not persuaded that the performance of the first eight days of December should be considered as indicative of the entire month.

Looking first at the residential repair standard (percent of troubles not cleared in 24 hours – residence), we find no basis to conclude that the performance of the first eight days of December was likely to be reflective of the entire month. Attachment A of FairPoint's filing shows that performance varies month to month. This is a function of a number of factors, including weather. We would expect that substantial variation also exists within months. It is in part because of this monthly variation that FairPoint's RSQP is calculated as a rolling average, rather than having performance measured each month.

Attachment A also highlights that FairPoint's performance on the residential repair standard for the first eight days of December (27.5%) is substantially lower than all but one other month in the entire year. The average for the year if December is not included is 41%. Even

3. This conclusion should not be interpreted to mean that we find the number of generators FairPoint now has on hand to be adequate. As FairPoint's Docket 6957 and PEP commitments reflect, FairPoint itself has concluded that it needs more generators to help ensure reliability. We encourage FairPoint to proceed with its planned acquisition of these generators quickly. In the December 2008 storms, however, it appears that more generators would not have helped as they still could not be deployed to the remote terminals where they were needed.

accepting FairPoint's assertion that its performance had been trending upwards, the previous three months (September through November) showed that 40.7% of troubles were not cleared within 24 hours. This figure is much more consistent with the yearly average excluding December than is the first week of December. In light of the fact that the first week of December appears to be an aberration relative to both the rest of the year and the preceding three months, it is more appropriate to use the average of the other eleven months as a proxy for December.

This methodology is also appropriate for use in calculating the business repair standard (percent of troubles not cleared in 24 hours – business). For that standard, the early December figures showed a result of 9.6%, in contrast to an average through November of 10.9%. FairPoint is correct that the previous four months had showed a favorable, downward trend; however, this limited time period is not sufficient to demonstrate that we should use the 9.6% figure for December, particularly since the beginning of this downward trend — August — was also the worst month of the year.

For the third standard, percent of residential calls not answered within 20 seconds, the average would be the same either using FairPoint's methodology or adjusting the figures to exclude all of December.

V. CONCLUSION

For the foregoing reasons, we conclude that FairPoint has demonstrated that the December 11, 2008, ice storm and its aftermath represented an exceptional circumstance that warrants a waiver of a portion of the RSQP. We also find that FairPoint's preparedness level was not a significant contributing factor, particularly since more generators and resource availability would not have addressed the particular issues that caused FairPoint's performance failures. We do not, however, find FairPoint's proposal to use the first eight days of December as a proxy for the entire month to be acceptable. Instead, FairPoint should use the average of the previous eleven months as the December figure.⁴ FairPoint shall recalculate its penalty points based upon this methodology and refile it with the Board by August 14, 2009. The Department shall submit

4. Mathematically, this is the same as using the rolling average through November and simply excluding December.

any comments upon the revised calculation by August 24, 2009. Assuming that the Department and FairPoint agree on the calculation, FairPoint shall proceed to issue the appropriate bill credits as soon as possible. In its August 14 filing, FairPoint shall inform the Board of the time that this credit will occur.

SO ORDERED.

Dated at Montpelier, Vermont, this 6th day of August, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 6, 2009

ATTEST: s/Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.